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Supreme Court, U.S.
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No. 00-770

In the Supreme Court of the United States

KAISER ALUMINUM AND CHEMICAL CORP.,
PETITIONER

v.

DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH
ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly deferred to the determination by the Mine Safety and Health Administration (MSHA) that "milling" under the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 802(h)(1), includes the processing of bauxite into alumina.

2. Whether the statutory authorization for MSHA to determine what constitutes milling under the Mine Act is unconstitutional.

3. Whether the rule of lenity prohibits deference to MSHA's interpretation of milling.

4. Whether documents that are created when litigation is not imminent and primarily because of safety concerns are protected by the work-product privilege.

5. Whether a federal self-critical analysis privilege shields documents from a government investigation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-14a) is reported at 214 F.3d 586. The opinions and orders of the district court (Pet. App. 15a, 16a, 17a-21a, 22a-23a, 24a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2000. A petition for rehearing was denied on August 14, 2000 (Pet. App. 1a-2a). The petition for a

writ of certiorari was filed on November 13, 2000 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 801 *et seq.*, assigns to the Secretary of Labor, acting through the Mine Safety and Health Administration (MSHA), the responsibility to issue mandatory safety and health standards, 30 U.S.C. 811, conduct inspections and investigations, 30 U.S.C. 813, and enforce the Mine Act by issuing citations and withdrawal orders, 30 U.S.C. 814. The Mine Act covers "[e]ach coal or other mine," 30 U.S.C. 803, a term of art that is broadly defined to include places where minerals are "extract[ed]," "mill[ed]," or "prepar[ed]." 30 U.S.C. 802(h)(1); Pet. App. 9a; *RNS Servs., Inc.* v. *Secretary of Labor*, 115 F.3d 182, 186 (3d Cir. 1997); *Donovan* v. *Carolina Stalite Co.*, 734 F.2d 1547, 1551-1552 (D.C. Cir. 1984). The term "milling" is not expressly defined. Instead, the Mine Act contemplates that the Secretary will "mak[e] a determination of what constitutes mineral milling." 30 U.S.C. 802(h)(1).

In conducting investigations, the Secretary may proceed informally or may hold a public hearing and issue subpoenas, which a federal district court enforces upon the Secretary's application. 30 U.S.C. 813(b). A mine operator that contests a citation or order issued by the Secretary as a result of an investigation may obtain a hearing before an administrative law judge of the Federal Mine Safety and Health Review Commission and may thereafter request discretionary review before the Commission. 30 U.S.C. 815(d), 823(d); see *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 204 (1994). Final

decisions of the Commission are reviewable in the courts of appeals. 30 U.S.C. 816.

2. a. Petitioner operates an alumina processing facility in Gramercy, Louisiana. Pet. App. 4a. Alumina processing is the first step in the production of aluminum from bauxite and other ores. *Id.* at 8a. After the bauxite is processed into alumina at petitioner's plant, petitioner sells the alumina to other entities that smelt it to make aluminum metal. *Id.* at 4a.

Following an explosion at petitioner's plant on July 5, 1999, MSHA convened a public hearing to investigate the explosion and issued subpoenas for the attendance of witnesses and the production of documents. Pet. App. 4a. Petitioner moved to quash the subpoenas, and MSHA sought their enforcement in the United States District Court for the Eastern District of Louisiana. *Ibid.*

b. The district court, reviewing and affirming a magistrate's decision, ordered petitioner to produce certain pre-accident documents that petitioner claimed were privileged as work product and "self-critical analysis." Pet. App. 22a-23a, 24a n.2. The magistrate found that "many of the documents were generated because of safety, rather than litigation, issues," and thus are not protected by the attorney work-product privilege. *Id.* at 26a-27a. In addition, the magistrate ruled that the "self-evaluation privilege," if it exists, does not apply against the government. *Id.* at 28a. Alternatively, the magistrate concluded, the public's interest in information about safety risks at petitioner's plant outweighs petitioner's interest in keeping secret its evaluation of safety issues. *Id.* at 29a.

The district court further ruled that MSHA had jurisdiction to investigate the July 5 explosion. Pet. App. 15a, 17a-21a. The court noted that the Mine Act

covers facilities engaged in "milling" and held that "milling" includes "the type of process that goes on at the Kaiser facility in Gramercy." *Id.* at 18a. The court found persuasive Judge Bork's analysis in *Carolina Stalite*, 734 F.2d at 1551-1552, which identifies the statutory and legislative bases for broad coverage and deference to the Secretary's interpretation of the Act, particularly the term "mineral milling." Pet. App. 18a-19a. The court observed that, although "an average lay person would not consider the Gramercy Kaiser plant to be a mine," the courts have not employed that test. *Id.* at 20a. Rather, they look to how the Act defines "mine," *ibid.*, and, in accordance with the legislative history, resolve doubts "in favor of inclusion of a facility within the coverage of the act." *Id.* at 21a.

3. The court of appeals affirmed. Pet. App. 1a-14a. The court first rejected petitioner's contention that MSHA lacks jurisdiction over the plant. *Id.* at 6a-13a.[1] The court explained that whether MSHA has jurisdiction turns on whether alumina processing constitutes "milling," a term included within the definition of "mine" in Section 802(h)(1). *Id.* at 8a. The court agreed with other courts of appeals that the Act's definition of "mine" is "sweeping" and "encompasses much more than the usual meaning attributed to it." *Id.* at 7a (quoting *Bush & Burchett, Inc.* v. *Reich*, 117 F.3d 932, 936 (6th Cir.), cert. denied, 522 U.S. 807 (1997)). The court observed that Section 802(h)(1) explicitly delegates to the Secretary the authority to define "milling" and agreed with the D.C. Circuit's conclusion that "this language 'gives the Secretary discretion, within reason,

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[1] In so doing, the court rejected MSHA's contention, see pp. 7-8, *infra*, that petitioner could not properly raise its jurisdictional argument in a subpoena enforcement proceeding.

to determine what constitutes mineral milling, and thus indicates that his determination is to be reviewed with deference . . . by . . . the courts.'" Pet. App. 9a (quoting *Carolina Stalite*, 734 F.2d at 1552 & n.9).

The court then held that the Secretary's definition of "milling," which is contained in a 1979 memorandum of understanding (MOU) between MSHA and the Occupational Safety and Health Administrative (OSHA), Pet. App. 30a-43a (44 Fed. Reg. 22,827-22,830 (1979)), is reasonable. The court noted that the MOU "expressly includes alumina plants within the jurisdiction of MSHA" and "could not be more clear" that MSHA's jurisdiction over alumina plants derives from congressional authorization in the Act. Pet. App. 11a. The court found MSHA's definition consistent with those in geological and mining dictionaries and with the Mine Act's legislative history, which instructs that "mine" be given the broadest possible interpretation and warns against the dangers of liquid and chemical milling operations. *Id.* at 11a-12a. The court rejected petitioner's proposed definition of milling, which limits the term to physical processes, as incompatible with the plain language of the Act, which does not exclude chemical processes. *Id.* at 12a-13a.

On the privilege issues, the court of appeals noted that the disputed documents were not included in the record on appeal. Pet. App. 13a. The court nonetheless affirmed the rulings of the district court and the magistrate (who had both examined the documents in camera) as correct applications of Fifth Circuit precedent. Under that precedent, the work-product privilege applies "where litigation is not imminent, 'as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.'" *Id.* at 13a-14a.

Regarding the self-critical analysis privilege, the court of appeals observed that new privileges are not "lightly created nor expansively construed." Pet. App. 14a (quoting *United States* v. *Nixon*, 418 U.S. 683, 710 (1974)). Moreover, the court observed that the Fifth Circuit has not adopted the privilege, and other courts of appeals have uniformly rejected its application against the government. *Ibid.* Therefore, the court declined to decide whether the privilege exists, but held that it does not protect documents against government investigation. *Ibid.*

Petitioner sought panel rehearing and rehearing en banc. The court of appeals unanimously denied those requests. Pet. App. 1a-2a.

4. While petitioner's challenges to the subpoenas were proceeding through the courts, MSHA issued a report concluding that the July 5, 1999, explosion resulted from operation of petitioner's facility at excessive pressure and petitioner's failure to maintain the pressure relief safety systems. MSHA therefore issued 23 citations and proposed $533,000 in fines. In December 2000, MSHA and petitioner entered into a settlement agreement, which requires petitioner and two corporate officials to pay $538,000 in fines and provides for prospective safety measures with MSHA oversight of the plant. See Settlement Agreement ¶¶ 4, 7; *id.* Exh. A ¶¶ (h), (k) and (n); App., *infra*, 5a, 7a, 16a, 17a, 18a.

ARGUMENT

Although the court of appeals should have declined to reach the merits of petitioner's jurisdictional argument, the court correctly concluded that MSHA has jurisdiction over petitioner's plant and correctly rejected petitioner's privilege claims. The court's decision does

not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. a. Because this is a subpoena enforcement proceeding, the court of appeals erred in reaching the merits of petitioner's argument that MSHA lacks jurisdiction over petitioner's plant. This Court has made plain that the courts should not decide statutory coverage questions in such proceedings. *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943) (judicial review is limited to determining whether the subpoena is "plainly incompetent or irrelevant to any lawful purpose"). Accord *Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 210 (1946); see also *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964); *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950). Coverage questions may be addressed in any administrative enforcement proceeding that is ultimately brought and in judicial review of that proceeding.

The Court's reasoning in *Endicott Johnson*—that judicial intervention at the subpoena stage would undermine the agency's delegated authority and interfere with sound administrative practice, 317 U.S. at 507-508—is particularly compelling here. MSHA's lawful purpose was to investigate an explosion at the facility—an investigation that resulted in 23 citations and proposed fines of $533,000. Until this case, petitioner has for 20 years voluntarily submitted mine identification forms and not contested on jurisdictional grounds the issuance of over 450 citations. See Gov't C.A. Br. 35-36. In fact, petitioner has affirmatively conceded MSHA jurisdiction in one case before the Federal Mine Safety and Health Review Commission. See *Kaiser Aluminum & Chem. Corp.* v. *Secretary of Labor*, 3 F.M.S.H.R.C. 2296, 2298 (1981). Moreover,

after petitioner filed its petition for a writ of certiorari, the parties settled the underlying enforcement action and, in the process, agreed to prospective oversight by MSHA over the facility. See p. 6, *supra*; Settlement Agreement Exh. A ¶¶ (h), (k) and (n); App., *infra*, 16a, 17a, 18a. The circumstances of this case thus illustrate the wisdom of this Court's precedent limiting the issues that are subject to review in such proceedings.

b. On the merits of petitioner's jurisdictional argument, the court of appeals correctly concluded that the alumina processing performed at petitioner's plant constitutes "milling" under the Mine Act. "Milling" (along with "extracting" and "preparing") is one of three basic mining activities covered in the Act's "sweeping" definition of "mine." Pet. App. 7a.[2] None of those terms is otherwise defined in the Act with respect to mineral mining. Cf. 30 U.S.C. 802(i) (defining *coal* preparation). The Act directs, however, that, "[i]n making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment." 30 U.S.C. 802(h)(1). This provision gives the Secretary reasonable discretion to determine what is

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[2] The statutory definition of mine includes in relevant part

> (C) * * * structures, facilities, * * * or other property * * * used in * * * the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in * * * the milling of such minerals, or the work of preparing coal or other minerals.

30 U.S.C. 802(h)(1).

"milling" and requires judicial deference to that determination. Pet. App. 9a (quoting *Donovan* v. *Carolina Stalite Co.*, 734 F.2d 1547, 1552 & n.9 (D.C. Cir. 1984)).

By assigning enforcement responsibility over all mining activity to a single agency, Congress intended to avoid overlapping inspections of milling operations by MSHA and OSHA. H.R. Rep. No. 312, 95th Cong., 1st Sess. 16, 22 (1977); S. Conf. Rep. No. 461, 95th Cong., 1st Sess. 38 (1977). In so doing, Congress noted with approval a prior interagency agreement between OSHA and the Mining Enforcement and Safety Administration (MESA), MSHA's predecessor, which had largely "alleviated" the problem of conflicting jurisdiction over milling operations under the Occupational Safety and Health Act of 1970 (OSH Act) and the now-repealed Federal Metal and Nonmetallic Mine Safety Act by conferring jurisdiction over such operations, including alumina processing, on MESA. H.R. Rep. No. 312, *supra*, at 16.

The Secretary, exercising his discretion to define "milling" in the same manner that Congress previously commended, thereafter adopted and published in the Federal Register an interagency agreement between MSHA and OSHA. Pet. App. 30a-43a; 44 Fed. Reg. 22,827-22,830 (1979). The MOU tracks the prior MESA/OSHA agreement by adopting verbatim that earlier agreement's expansive description of "milling" and provides a similar illustrative list of processes that fall within the term "milling," such as "concentrating" and "calcining," as well as "leaching," "drying," "roasting," and "kiln treatment," *id.* at 22,829, all of which are performed at petitioner's facility, see Pet. App. 8a, 39a, 40a. The MSHA/OSHA agreement also makes explicit what was implicit in the prior MESA/OSHA agree-

ment: "MSHA jurisdiction includes * * * alumina * * * plants." *Id.* at 22,828; Pet. App. 11a.

As the court of appeals correctly observed, Pet. App. 11a-12a, the definition of "milling" contained in the interagency agreement is similar to definitions in geological and mining dictionaries and is consistent with the clearly expressed legislative intent that "mine" "be given the broadest possible interpretation" and that "doubts be resolved in favor of inclusion of a facility" within Mine Act coverage. *Ibid.* (citing S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977)). Moreover, the court below correctly pointed out that the Mine Act was intended to address dangers associated with "chemical processing of ores" and milling operations where the ore (as at petitioner's facility) is liquified, vaporized, and condensed. *Id.* at 12a (citing H.R. Rep. No. 312, *supra*, at 10-11). In light of the express statutory assignment of authority to the Secretary, the clear legislative intent, and the supporting scientific and technical material, the court of appeals properly deferred to the agency's interpretation of "milling." Pet. App. 11a-12a; accord *Carolina Stalite*, 734 F.2d at 1551-1554.

c. The court of appeals' decision applies the bedrock legal principle that courts are to accord deference to the formal interpretations of a statute adopted by the agency that has been "charged with responsibility for administering the provision" by Congress. *Chevron U.S.A. Inc.* v. *Natural Res. Defense Council, Inc.*, 467 U.S. 837, 865 (1984). Deference is particularly appropriate where, as here, Congress has expressly assigned to the agency the authority to interpret a provision. See *ABF Freight Sys., Inc.* v. *NLRB*, 510 U.S. 317, 324 (1994); *Chevron*, 467 U.S. at 844. Petitioner nonetheless contends (Pet. 10-12), relying on *Christensen* v. *Harris*

County, 529 U.S. 576 (2000), that *Chevron* deference was improper because the Secretary exercised her assigned authority to interpret "milling" through an interagency agreement. *Christensen*, however, provides no aid to petitioner, for several reasons.

First, although *Christensen* was decided before the court of appeals issued its opinion, petitioner did not bring the case to that court's attention until its petition for rehearing. See Fed. R. App. P. 28(j) (allowing litigants to bring pertinent authorities to court's attention after briefs have been filed); *Glover* v. *United States*, 121 S. Ct. 696, 701 (2001) (this Court ordinarily does not decide questions neither raised nor decided below).

Second, *Christensen* does not preclude the application of *Chevron* deference under the circumstances of this case. *Christensen* did not involve an express congressional assignment of interpretative authority, such as the one in the Mine Act. Even with respect to situations in which Congress has not expressly empowered an agency to interpret a statutory term, *Christensen* holds only that *informal* agency interpretations, such as private "opinion letters," "policy statements, agency manuals, and enforcement guidelines," warrant less than *Chevron* deference. 529 U.S. at 587 (citing 1 Kenneth C. Davis & Richard J. Pierce, *Administrative Law Treatise* § 3.5 (3d ed. 1994)). Less deference is accorded such interpretations because they are issued in a format that "Congress has not authorized for that purpose." 1 Davis & Pierce, *supra*, at 120. In contrast, interpretations in "a form expressly provided for by Congress" are entitled to *Chevron*- type deference. See *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991). MSHA has interpreted "milling" to include the processing of alumina in two formats, both of which are formats authorized by Congress. MSHA's interpretation is reflected in

the issuance of citations and orders, including more than 450 citations to petitioner over the last 20 years. See p. 7, *supra*; 30 U.S.C. 814 (authorizing the Secretary to issue citations); *Martin*, 499 U.S. at 157 (deferring to Secretary's interpretation reflected in citation under the OSH Act). MSHA's interpretation is also reflected in the interpretative rule that the Secretary published in the Federal Register in the form of an MOU between MSHA and OSHA, a form previously approved by Congress. See p. 9, *supra* (noting that Congress, in providing for the Secretary to define "milling," approved prior MOU); 30 U.S.C. 957 (authorizing Secretary to promulgate regulations to carry out the Mine Act).

Third, there is no reason to believe that the court of appeals' decision that MSHA has jurisdiction over petitioner's plant turned on the level of deference that the court accorded the Secretary's interpretation of "milling." The Secretary's interpretation is well-reasoned, based on thorough consideration, and consistent with long-standing policies (of which Congress was aware and which it approved when enacting the Mine Act).[3] The interpretation is thus worthy of deference under any standard. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); *Carolina Stalite*, 734 F.2d at 1552 (noting that the Secretary's determination is "well within the bounds of reasonableness" and according it "the deference it deserves"). Finally, there is no conflict among the courts of appeals on the level of deference owed the Secretary's definition of "milling,"

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[3] By contrast, petitioner's cabining of "milling" to simple physical processes (Pet. 5; Pet. App. 12a) conflicts with the regulatory and legislative history, as well as the fact that Congress could have, but did not, limit the term in that manner. *Id.* at 12a.

either in general, or as applied to alumina processing in particular.

d. Petitioner's next argument—that the statutory authorization for the Secretary to consider administrative convenience in determining what constitutes "milling" violates the nondelegation principle (Pet. 12-15)—is also neither properly presented nor persuasive. Like the *Christensen* issue, the nondelegation issue was not presented to the court of appeals before the rehearing petition. In any event, this Court has repeatedly held that Congress does not violate the Constitution "merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991). It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)).

Those parameters are easily met here. The term "milling," although statutorily undefined, is not an empty vessel. It has particular technical and scientific meanings, which, as the court of appeals noted (Pet. App. 11a), comport with the Secretary's definition. See also *id.* at 36a (interagency agreement relies on mining textbook for discussion of milling). Congress also directed the Secretary, when defining the scope of "milling," to consider the "convenience of administration" in vesting regulatory oversight in one agency. 30 U.S.C. 802(h)(1). Congress further indicated that the Secretary should give "mine" its broadest possible scope and should resolve any doubts in favor of Mine Act coverage. S. Rep. No. 181, *supra*, at 14. Given

those clear and intelligible directions, the statutory authorization did not overstep constitutional bounds.[4]

e. Petitioner also errs in contending (Pet. 15-19) that the rule of lenity precludes judicial deference to the Secretary's milling determination. The rule of lenity resolves "ambiguity concerning the ambit of criminal statutes * * * in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). It provides that, "when choice has to be made between two readings of what conduct Congress has made a crime," a court should not choose the harsher alternative unless Congress has "spoken in language that is clear and definite." *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (quoting *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952)). The rule is irrelevant to the proper interpretation of "milling" under the Mine Act, because the Act does not criminalize "milling." Criminal penalties under the Act apply to willful violations of mandatory health and safety standards or knowing violations of withdrawal orders. 30 U.S.C. 820(d). Moreover, there are no criminal penalties at issue in this case, nor

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[4] Petitioner contends (Pet. 13 n.20) that the nondelegation issue arises not from the statutory text itself, but from the panel's construction of the text. Petitioner suggests that the court of appeals erred in not restricting the statutory delegation to "facilities located adjacent to acknowledged mining facilities" and excluding "freestanding manufacturing facilities like [petitioner's] which are not physically adjacent to mines regulated by MSHA." *Ibid.* That is not a nondelegation argument, but simply a claim that the court of appeals misinterpreted the Act. That claim is not worthy of this Court's review, and is, in any event, unsupported by the text of the Act, which does not limit coverage to milling facilities that are adjacent to extraction facilities.

will there be. See Settlement Agreement ¶ 7; App., *infra*, 7a.[5]

The rule of lenity is "premised on two ideas: First, '"a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed"'; second, 'legislatures and not courts should define criminal activity.'" *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 704 n.18 (1995) (quoting *Bass*, 404 U.S. at 347-350). Neither premise pertains here. Petitioner concedes that it knew that its operations fell within "milling" as the Secretary interpreted it. Pet. 15 n.24; see also p. 7, *supra* (noting that petitioner had not contested MSHA jurisdiction over its plant for 20 years); *Babbitt*, 515 U.S. at 704 n.18 (regulation in existence for 20 years provided fair notice and precluded operation of rule of lenity). In addition, the rule has no application where, as here, a party makes a facial challenge to an agency's formal interpretation of a statute. Pet. 15; *Babbitt*, 515 U.S. at 704 n.18 ("We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement."); *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000).

2. a. Petitioner also mistakenly contends (Pet. 20-26) that the court of appeals erred in not shielding certain

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[5] *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 517-518 (1992), on which petitioner relies, is inapposite. In that case, this Court applied the rule of lenity even though only civil sanctions were at issue because the criminal prohibitions under the statute in that case carried no additional requirement of willfulness. Under the Mine Act, however, criminal penalties may be imposed only for willful or knowing violations.

documents as attorney work product.[6] As petitioner points out, the Fifth and Second Circuits have used somewhat different language in describing the standard for determining when documents are "prepared in anticipation of litigation" under Federal Rule of Civil Procedure 26(b)(3). The different formulations do not, however, generally lead to different outcomes and would not lead to a different outcome in this case. Therefore, this case is not an appropriate one for resolving any disagreement that may exist. Cf. *Upjohn Co.* v. *United States*, 449 U.S. 383, 396-397 (1981) (refusing to draft set of rules applying attorney-client privilege and relying instead on case-by-case method for determining boundaries of privilege).[7]

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[6] We have been informed by the Department of Labor that petitioner voluntarily provided MSHA with the most significant of the five or six documents at issue.

[7] Contrary to petitioner's unsupported assertion (Pet. 21), *Delaney, Migdail & Young, Chartered* v. *IRS*, 826 F.2d 124 (D.C. Cir. 1987), and *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49 (7th Cir. 1980), are not "irreconcilably inconsistent" with the decision in this case. Neither case advances a general rule for determining when documents are prepared in anticipation of litigation. Moreover, the results in those cases would have been the same had those courts applied the Fifth Circuit's formulation. In *Delaney*, the plaintiff sought production of IRS legal memoranda evaluating the legal vulnerabilities of a particular program, "precisely the type of discovery the Court refused to permit in *Hickman v. Taylor*, 329 U.S. 495, 513 * * * (1947)," 826 F.2d at 127, and it was not seriously contested that the documents were prepared in anticipation of litigation. *Id.* at 126. In *In re Special September 1978 Grand Jury (II)*, the sought-after documents had been prepared by a law firm *after* it was apprised of a grand jury investigation. 640 F.2d at 61-62. The litigation was "imminent," and the case thus falls outside the Fifth Circuit's primary motivating purpose rule.

The Second Circuit has adopted a general formulation espoused by Professor Wright: Documents are attorney work product "if 'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation.'" *United States* v. *Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998). The Fifth Circuit has stated that "the privilege can apply where litigation is not imminent, 'as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.'" Pet. App. 13a-14a. The two formulations, although cast in different language, are harmonious and lead to similar results. See *Babcock & Wilcox Co.* v. *OSHRC*, 622 F.2d 1160, 1168 (3d Cir. 1980) ("It is not unusual that different words are used to describe the same basic concept. Our literature would indeed be sterile if that were not the case.").

The primary motivating purpose rule, which by its terms applies only when litigation is not imminent, is in essence a specific adaptation of the more general "facts and circumstances" analysis. In cases in which the prospect of litigation is distant or improbable (*i.e.*, not imminent), the causation element of the "facts and circumstances" test requires that the document be more closely associated with a litigation, rather than a business, purpose. See, *e.g.*, *National Union Fire Ins. Co.* v. *Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992) ("[B]ecause litigation is an ever-present possibility in American life, it is more often the case than not that events are documented with the general possibility of litigation in mind. Yet, '[t]he mere fact that litigation does eventually ensue does not, by itself, cloak materials' with work product immunity. The document must be prepared *because* of the prospect of litigation

when the preparer faces an actual claim or a potential claim following an actual event or series of events * * *. Determining the driving force behind the preparation of each requested document is therefore required in resolving a work product immunity question.") (internal citations omitted). Thus, the two formulations are consistent when they are applied to similar facts.[8]

Moreover, the outcome in this case would be the same even under the Second Circuit's approach. The magistrate judge and district court, following in camera review of the allegedly privileged documents, determined that "it is readily apparent that many of the documents were generated *because of* safety, rather than litigation, issues." Pet. App. 27a (emphasis added). Thus, inspection of the documents apparently revealed that they had *no* litigation purpose and fall outside any accepted construction of the work-product doctrine. Further, petitioner's failure to include the documents in the record on appeal, *id.* at 13a, prevented the court of appeals from reviewing the district court's factual

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[8] The Second Circuit has criticized the primary motivating purpose rule, *Adlman*, 134 F.3d at 1198-1202, but that criticism was based largely on a misunderstanding of the rule. The panel in *Adlman* failed to recognize that the Fifth Circuit rule applies only in cases in which litigation is not imminent, and the panel wrongly believed that, in order to meet the Fifth Circuit rule, documents must primarily assist in the conduct of litigation. *Id.* at 1198. In fact, the Fifth Circuit rule examines the motivating purpose behind the document's *creation* and also whether it could aid in possible litigation. The term "aid" is far broader than construed by the *Adlman* panel. Indeed, it is hard to imagine a case where a document was prepared "because of" litigation but did not "aid" the litigation in some fashion. For instance, documents containing discarded legal theories provide aid by focusing counsel on legal strategies that may be more successful.

findings, and consequently, precluded petitioner from carrying its burden on appeal of demonstrating that the disputed documents fall within the exception. See, *e.g.*, *Hodges, Grant & Kaufmann* v. *United States Gov't*, 768 F.2d 719, 721 (5th Cir. 1985); *Holmes* v. *Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000).

b. Finally, petitioner contends (Pet. 26-30) that the Court should grant review to resolve a conflict among the courts of appeals over the existence of a "self-critical analysis privilege." This case does not present an occasion to resolve that conflict, however, because the court of appeals expressly declined to decide whether such a privilege exists. See Pet. App. 14a ("We need not decide whether a self-evaluation privilege should ever be recognized."). Instead, the court followed a uniform line of court of appeals decisions that have rejected application of the self-critical analysis privilege in cases in which the government seeks access to documents. *Ibid.* See, *e.g.*, *FTC* v. *TRW, Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980) (citing *Emerson Elec. Co.* v. *Schlesinger*, 609 F.2d 898 (8th Cir. 1979); *United States* v. *Noall*, 587 F.2d 123 (2d Cir. 1978), cert. denied, 441 U.S. 923 (1979); *Reynolds Metals Co.* v. *Rumsfeld*, 564 F.2d 663 (4th Cir. 1977), cert. denied, 435 U.S. 995 (1978)).[9]

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[9] Petitioner incorrectly asserts (Pet. 27-28) that the decision in this case conflicts with *ASARCO, Inc.* v. *NLRB*, 805 F.2d 194, 200 (6th Cir. 1986), and the unpublished memorandum opinion in *Bredice* v. *Doctors Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970), aff'd, 479 F.2d 920 (D.C. Cir. 1973) (Table). *Bredice* did not involve a government request for documents, and, in any event, the D.C. Circuit's published opinion in *FTC* v. *TRW* stands as governing circuit precedent. *ASARCO* also is inapposite. It was a labor relations case arising from a union's request for ASARCO's

The conclusion that no self-critical analysis privilege applies when the government subpoenas documents is supported by this Court's decision in *University of Pennsylvania* v. *EEOC*, 493 U.S. 182 (1990). In that case, the Court refused to protect from disclosure educational peer-review materials because Congress had given the EEOC a "broad right of access to relevant evidence * * * [and] d[id] not carve out any special privilege relating to peer review materials." *Id.* at 191. The Court further determined that maintaining the confidentiality of peer reviews, although important, does not outweigh the "great, if not compelling, governmental interest" in ferreting out discrimination. *Id.* at 193. As with the EEOC, Congress has placed no express limitations on MSHA's power to investigate an accident at a covered facility, 30 U.S.C. 813(b), and it has clearly expressed a compelling interest in protecting the safety of miners, the "most precious resource" in the mining industry. 30 U.S.C. 801(a).

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internal investigative report on a mine accident, which the union sought in order to perform its collective bargaining duties. The court held that the report was "not relevant or reasonably necessary to the Union's representative duties" and thus ASARCO properly withheld it. 805 F.2d at 200. The court did not uphold ASARCO's right to withhold the document based on the self-evaluation privilege. Moreover, a union, not the government, was seeking the document.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNERWOOD
Acting Solicitor General

JUDITH E. KRAMER
Acting Solicitor of Labor

ALLEN H. FELDMAN
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Department of Labor

FEBRUARY 2001

APPENDIX

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

Docket Nos.: CENT 2000-122-M
through CENT 2000-132-R
Docket No.: CENT 2001-40-RM
Docket No.: CENT 2001-41-RM
Citation Nos.: 7881936 through 7881956
Mine: Gramercy Works

KAISER ALUMINUM & CHEMICAL CORP., CONTESTANT

v.

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, RESPONDENT

UNITED STEELWORKERS OF AMERICA, INTERVENOR, AND CRAIG PRICE, INTERVENOR

CONTEST PROCEEDINGS

Docket Nos. CENT 2000-200-M
& CENT 2000-201-M
AC Nos. 16-00352-05573 & 16-00352-05573
Docket Nos. CENT 2001-51-M & AC No. 16-00352-05583
Mine: Gramercy Works

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, PETITIONER

v.

KAISER ALUMINUM & CHEMICAL CORP., RESPONDENT

PENALTY PROCEEDINGS

SECRETARY'S REVISED MOTION TO APPROVE SETTLEMENT AND MOTION TO DISMISS

The Secretary of Labor, United States Department of Labor (Secretary) moves for an Order approving the proposed settlement agreement which the parties have reached with respect to the above-captioned matters. In summary, Kaiser has agreed to withdraw its contest of the below-listed citations/orders and pay penalties in the amount of $513,000.

The Secretary has agreed to vacate the remainder of the citations and orders at issue in the remaining dockets. In addition, the Secretary has issued two additional orders which Kaiser has contested and for which Kaiser agrees to pay penalties in the amount of $72,000 which is included in the total penalty payment of $513,000. Finally, two individuals have agreed to settle and pay $12,500 each in civil penalties assessed pursuant to Section 110(c) of the Mine Act, for violations which they had reason to know existed. The additional orders and the penalties under Section 110(a) and (c) have been assessed and contested by the Respondents. The Petitions for Assessment are being filed, and answered, and the cases are now being settled as part of this total global settlement between the Secretary of Labor, Kaiser Aluminum and Chemical Corporation, and the individual Respondents.

1. This case involves an investigation subsequent to an explosion that occurred on the morning of July 5, 1999 at the Gramercy Works Facility. A significant

number of miners at the mine were injured, three of whom sustained severe disabling injuries. The Gramercy Works Facility is an alumina processing facility located in Gramercy, Louisiana. Although contested earlier in a public hearing subpoena challenge and retained as an issue for review in Kaiser's Petition for Certiorari (214 F.3d 586 (5th Cir. 2000)), for purposes of resolving this matter, the parties have agreed that the Gramercy Works Facility is a "mine" as defined under Section 3(h) of the Mine Act. This mine was operated by Kaiser Aluminum and Chemical Corporation.

2. MSHA inspectors and investigators investigated the July 5, 1999 explosion. They concluded that the immediate cause of the explosion was an excessive pressure build up in pressure vessels in the digestion process area of the facility, following an electrical fault causing a power distribution failure, and the response thereto. MSHA found deficiencies in the pressure relief safety systems, which MSHA concluded were violations of the regulations. Several of the deficiencies were voluntarily disclosed to MSHA and other government agencies by Kaiser in a letter dated August 5, 1999. These conditions were set forth in the MSHA investigative report. MSHA also issued other citations and orders for violations of the regulations which took place during the investigative proceeding. See MSHA investigative report and the additional conclusions and amendments in this settlement agreement.

3. The Secretary and Kaiser have agreed to settle these matters. MSHA is agreeing to modify certain negligence level findings, and a gravity finding in one order and to vacate four orders, and Kaiser has agreed to pay agreed upon sums for the remaining citations

and orders. Below is a list of the citations and orders and the disposition that the parties have agreed to:

Citation or Order	Alleged Negligence Modifications	Agreed Upon Penalty
7881936	High	$52,000
7881937	High	$52,000
7881938	High	$52,000
7881939	No changes	$52,000
7881940	High	$52,000
7881941	High	$52,000
7881942	vacated	N/A
7881943	vacated	N/A
7881944	High	$2,500
7881945	High	$2,500
7881946	High	$2,500
7881947	High	$2,500
7881948	vacated	N/A
7881949	Moderate	$14,000
7881950	Moderate and Non-contributory	$10,000
7881951	Moderate	$14,000
7881952	Moderate	$14,000
7881953	no change	$16,000
7881954	no change	$16,000
7881955	no change	$16,000
7881956	vacated	N/A
7885803	no change	$10,000
7885804	no change	$9,000
7718310	no change	$52,000
7718308	no change	$20,000

With respect to the violations of 30 C.F.R. § 48.27(c) (Orders No. 7881949, 7881950, 7881951, 7881952), the reduction in negligence and modification of the viola-

tions to Section 104(a) citations, except for Order No. 7881950, acknowledges that proper emergency procedures task training is beyond that specifically required by other provisions of Part 48. The Secretary further determined that the digestion control room operator's conduct addressed in Order No. 7881950 did not contribute to the accident. Finally, the Secretary notes that each of the miners involved in these violations had training that was otherwise in compliance with 30 C.F.R. Part 48.

On October 26, 2000, two additional citations (No7718310 and 7718308) were issued for violative conditions. MSHA proposed a civil penalty of $52,000 for one, and $20,000 for the other. Kaiser concurrently contested the citations and moved for consolidation with this case, and the penalties and citations are subject to the terms of this Motion and Settlement Agreement, with Kaiser agreeing to pay a $52,000 penalty for one and $20,000 for the other. This settlement and the changes to the proposed penalties reflect the vagaries of litigation and a compromise between the parties in light of the risk of litigation.

4. The payment of the total sum of $513,000 by Kaiser Aluminum is appropriate and reflects due consideration of the nature of its conduct and the penalty criteria contained in §110(i) of the Act. The parties agree that the mine is a large facility and that the operator is a large company. The penalties, to be paid in twelve equal payments within one year from thirty days after the approval of this settlement motion, will not adversely affect the operator's ability to continue in business. The operator has a favorable history of prior violations and has promptly abated the cited conditions.

Good faith abatement is also demonstrated by the prospective steps that the operator has agreed to take in this matter as set forth in Paragraph 9 below.

5. For the sole purposes of this settlement motion the parties agree that the gravity associated with these violations is as stated in the citations and orders, including the amendment to Order No. 7881950.

6. This agreement is entered into by both parties in lieu of continued litigation under the Mine Act, other than the issues raised in Kaiser's pending Petition for Certiorari, 214 F.3d 586 (5th Cir. 2000). The parties have taken different positions regarding the validity of the citations and orders and the appropriate level of negligence. The Secretary has agreed to modify the alleged negligence levels of some of the above listed citations and orders as set forth in Paragraph 3, to reflect a high level of ordinary negligence. The parties agree that for all purposes except those delineated in Secretary v. Amax Lead Co., 4 FMSHRC 975 (1982), Kaiser does not admit either the validity of the citations and orders, the alleged levels of negligence, or the facts alleged by the citations, orders, or any and all reports of MSHA or its personnel. The parties further agree that for purposes of all actions except for actions to which the United States and/or the Secretary of Labor is a defendant, nothing herein shall be construed as an admission by Kaiser. The parties agree that for all purposes except those delineated in Secretary v. Amax Lead Co., 4 FMSHRC 975 (1982), Kaiser and the Secretary are entering this agreement without prejudice to their rights to make future arguments or raise any defenses in any other cases, including the pending Petition for Certiorari, 214 F.3d 586 (5th Cir. 2000), and,

for all purposes except for those delineated in Secretary v. Amax Lead Co., 4 FMSHRC 975 (1982), Kaiser and the Secretary retain their right to assert in any subsequent action that conditions or practices cited in the original citations, or the amended citations or orders, may or may not be violations of standards or provisions of the Mine Act.

7. Pursuant to Section 110(c) of the Mine Act, two parties who had reason to know regulatory violations existed, received personal civil penalties of $12,500 each. The two parties exercised their right to contest the proposed penalties and agreed to pay them, without admissions, pursuant to the terms of the attached settlement motions.

8. The Secretary will not take any further action relating to the actions, events, or violations at issue in these proceedings against Kaiser or any corporate agents, nor will she refer any further action against Kaiser or any corporate agents relating to the actions, events, or violations at issue here to any other agency. This settlement agreement is acknowledged by the parties to be a global and final resolution of all outstanding and potential matters resulting from or related to the July 5, 1999 event and the Secretary's investigation thereof, except for the issues raised in Kaiser's pending Petition for Certiorari, 214 F.3d 586 (5th Cir. 2000). Further, upon request by Kaiser, the undersigned counsel for the Secretary will inform any other government agency or department of the finality of this settlement.

9. As indicated in the attached document (Exhibit A), the respondent has agreed to undertake a program of prospective efforts, thereby demonstrating addi-

tional good faith in abatement of the conditions at issue in these proceedings.

WHEREFORE, the Secretary moves for approval of this proposed settlement and an order requiring compliance with the payment plan agreed to herein.

DATED: 12/8/2000

Respectfully submitted,

HENRY L. SOLANO
Solicitor of Labor

EDWARD P. CLAIR
Associate Solicitor of Labor

SHEILA K. CRONAN
Counsel for Trial Litigation

/s/ MARK R. MALECKI
MARK R. MALECKI
EDWARD H. FITCH IV
Trial Attorneys

U.S. Department of Labor
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CERTIFICATE OF SERVICE

I certify that copies of the Revised Motion to Approve Settlement were served on the following at the addresses and in the manner set forth below on this 8th day of December, 2000:

BY HAND DELIVERY:
Executive Director
Federal Mine Safety and
Health Review Commission
1730 K Street, N.W.
Sixth Floor
Washington, D.C. 20006

BY FACSIMILE AND FIRST CLASS MAIL:
Henry Chajet, Esq.
Mark Savit, Esq.
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James Boren, Esq.
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BY CERTIFIED MAIL:
Harry Tuggle
United Steelworkers of America
Five Gateway Center, Room 902
Pittsburgh, PA 15222

/s/ MARK R. MALECKI

Settlement Motion Exhibit A: "Prospective Measures" Required By MSHA

(a) *American Society of Mechanical Engineers Boiler and Pressure Vessel Code*

1. All *new, year 1999-2000* vessels are in accordance with the ASME Code. All boilers were constructed and are maintained in accordance with ASME Code.

2. The revised Gramercy *Pressure Systems Control Policy* requires that maintenance of all pressure vessels and piping systems be in accordance with ASME Code.

3. Gramercy still has viable and safe equipment in use that was built and installed in the mid to late 1950's period. Some of this equipment was not constructed in accordance with current ASME Code. Much of it was constructed as American Petroleum Institute (API) class. There were not requirements at that time to conform with ASME Code and it is not feasible to apply the Code now. However, critical sections of the Plant were reviewed following the July 5, 1999 incident. It was found that certain heater vessels in HID and Evaporation had to be strengthened to meet the requirements of the new Gramercy operation. The vessels have been modified and the pressure ratings upgraded in accordance with professional engineering calculations. However, the older vessels do not have ASME codes.

(b) *Process Safety Management Programs (PSMP)*

1. Gramercy has implemented the Operational Integrity Management System (OIMS) as its Process Safety Management Program. All 13 elements of Kaiser's OIMS Manual are being implemented:

   - Employee Participation
   - Operational Safety Information
   - Operational Hazard Analysis
   - Standard Operating Procedures
   - Training
   - Contractor Safety
   - Mechanical Integrity
   - Pre-Startup Safety Review
   - Safe Work Policies
   - Management of Change
   - Incident Investigation
   - Compliance Inspections
   - Emergency Response and Planning

(c) *Pressure Relief Safety System Design Basis (PRSSDE)*

1. The new Gramercy Digestion installation has been designed for *Three Phrase* flow (solids, liquids, vapors). The design was done by ICF Kaiser Engineers (Australia) who have proprietary programs to calculate all parameters and predict responses to process upsets.

2. The Digestion relief system has been designed to relieve 120% of designed maximum flow for each tank in the case of a fully blocked condition and the relief headers have also been

designed to accommodate 150% of maximum design flow.

3. Additionally, pilot relief valves have been added to relieve at 90% MAWP, in order to reduce the potential frequency of opening the normal spring type relief valves.

4. The new Digestion relief headers are sloped to facilitate drainage in the case of a relief valve opening. The new main headers are 42 inches and 54 inches in diameter and should not be prone to plugging. There will also be a mandatory inspection program every 3 - 5 years and if required a clean out of the main headers will be done. The length of time between inspections will depend upon what is found in the initial inspection cycles. Temperature sensing devices have been placed in each relief header providing knowledge of relief valve lifts. Upon a lift, the cause will be determined and corrective action taken. If a sufficient number of significant events occurs, Kaiser will either run thermographic scans to determine if blockages have occurred or inspect the headers. In combination with the 3-5 yr mandatory inspection program, this process will be adequate to maintain the headers in operating condition. Temperature indicators have been installed in the relief systems so that any leakage or opening of the relief valves can be immediately determined and the cause corrected.

(d) *Valve Supervision Program*

Kaiser has updated all P&IDs for critical plant systems including identifying all valves. The engineering department's new pressure vessel engineer must approve any safety related valve modifications or changes, other than those included in normal operations. Kaiser's new Pressure Systems Control Policy, Section 6 ("the Blue Book") mandates specific policy and procedures, including audits to ensure compliance with company policy. The Blue Book is available for all employees and used in training. Kaiser has set up a relief valve tracking system that is set forth in Section 6 of its new Pressure Systems Control Policy. The digestion control room operator will be able to see the position of all process control valves from his video monitor. Moreover, the digestion control room operator will know the process flow path by the reaction of the process to the control valves. Further, Kaiser has a lock out/tag out system in place that will be used to identify any valves that have been adjusted for maintenance activities. The digestion shift supervisor has responsibility for the process and process safety and will delegate to the control room operator, as appropriate, tasks associated with process control and process safety.

(e) *Plant-Wide Evacuation Alarm System (PEAS)*

1. Gramercy has an alarm to evacuate the plant in the case of a toxic gas release (nearby Chlorine Plant). It is activated from the guardhouse at the main plant entrance. The plant has a radio system for backup. The

digestion control room can communicate instantly with the guard house by telephone.

2. Emergency response planning and training have been substantially improved, in coordination with the Louisiana State Policy and Parish Official. A plant wide system with both audio and visual notification, sourced from two locations with an emergency power backup will be investigated and a feasibility determination will be made.

(f) *Emergency Operating Procedures and Training*

1. Gramercy has just revised its major Standard Operating Procedures to include emergency shutdown procedures. Operators have and will continue to be trained and certified in these procedures.

2. Gramercy will participate in an MSHA review of these procedures and will upgrade them as required for safe operations.

(g) *Digestion Area Specific Design Features*

1. As required by MSHA, all new Digestion pressure vessels have been designed such that normal operating pressures are well below the MAWP and have an adequate safety margin between their MAWP and operating pressure. The relief tank does not have an MAWP since it is an open top tank.

Tank	Normal, psig	MAWP, psig
Blow Off Tank	0	70
No. 10 Flash Tank	8	100
No. 9 Flash Tank	14	150
No. 8 Flash Tank	22	150
No. 7 Flash Tank	38	150
No. 6 Flash Tank	55	200
No. 5 Flash Tank	75	330
No. 4 Flash Tank	100	330
No. 3 Flash Tank	140	460
No. 2 Flash Tank	195	460
No. 1 Flash Tank	270	460

(h) *Digestion Area Specific Operating Procedures*

1. Standard Operating Procedures and a Maintenance Program for Digestion are currently in place and available for employee and MSHA review. Kaiser will brief MAHA personnel on the new plant and operating systems and procedures, as well as make available for MSHA's review copies of its operating procedures and policies.

(i) *Training*

1. The Gramercy Plant's Pressure Systems Control Policy covers maximum allowable working pressures, Pressure Relief Systems, and hazards associated with non-functioning pressure relief systems.

2. Special training sessions were conducted with supervisors, superintendents, and managers to ensure full understanding of this policy. Hourly

employees receive this training as part of their orientation.

3. The training will be reviewed to ensure there is sufficient coverage concerning hazards associated with non-functioning pressure relief systems.

(j) *Safety Showers and Eye Wash Stations With Self-Contained Water Sources*

1. A search was conducted in an effort to find commercially available self-contained safety showers and eye wash stations, but no commercially available sources were found. However, the new Digestion Unit will have a water booster pump that is connected to the emergency generator system that will provide safety water to the area even under conditions of a total power failure.

(k) *Workplace Examinations*

1. Kaiser will conduct workplace examinations as required by MSHA standards and track them, and needed corrective actions, on the plant computer system.

(l) *Training in Miner's Rights and Responsibilities*

1. Kaiser will expand its training on employee rights and responsibilities regarding safety and health.

(m) *Safety and Health Inspections*

1. The Kaiser and USWA joint safety and health committee will perform a comprehensive safety and health audit of the Gramercy Works Facility no less than semi-annually, and report the results, in writing, to Kaiser and the USWA. Kaiser will respond to the audit results in writing within fifteen working days. For each item identified in the audit, Kaiser will state the date for abatement, the means of abatement, or the reasons why, in Kaiser's opinion, abatement is not necessary to protect employees or its infeasible. Copies of the response will be given to USWA. Kaiser will consider time spent on the audit and associated meetings to be hours worked. The first audit will commence within sixty days from the date of the settlement agreement and will include a review of Kaiser's plans for rebuilding the plant and resuming production. Subsequent audits will consider both existing hazards in the facility, and the safety and health implications of changes to equipment or operating procedures planned by Kaiser.

2. (n) *Documentation*

1. Kaiser has and will continue to respond to MSHA document requests regarding regulatory compliance. Kaiser agrees to report to MSHA by letter, every six months for eighteen months, a summary of status of its efforts and activities described in this Exhibit, starting six months after the approval of a settlement motion.